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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
BEEHIVE TELEPHONE COMPANY, INC.	)	CC Docket No. 98-108
BEEHIVE TELEPHONE, INC. NEVADA	)	
	)	
Tariff F.C.C. No. 1	)	Transmittal No. 11
	)	

To: The Commission

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

Beehive Telephone Company, Inc. and Beehive Telephone, Inc. Nevada (collectively "Beehive"), by their attorney, and pursuant to section 1.106(h) of the Commission's Rules ("Rules"), hereby reply to the AT&T Opposition to Petition for Reconsideration ("Opposition") filed by AT&T Corp. ("AT&T") in the above-captioned proceeding.

I.

The Opposition was untimely. Beehive served its Petition for Reconsideration by facsimile on AT&T's Washington, D.C. office on December 31, 1998. Because service by facsimile is equivalent to hand delivery, *see* 47 C.F.R. § 1.4(h), AT&T's opposition was due to be filed on January 11, 1999. *See id.* at §§ 1.4(j), 1.106(h). Since it was filed on January 13, 1999, the Opposition was late and may be dismissed. *See, e.g., Clifford Stanton Heinz Trust*, 11 FCC Rcd 5354, 5357-58 (Wireless Telecomms. Bur. 1996).

II.

AT&T mistakenly states that Beehive's pending Application for Review relates to its Transmittal No. 8. *See* Opposition at 2 n.2. Beehives seeks review of the action of the Common Carrier Bureau ("Bureau") rejecting the local switching rates Beehive filed by its Transmittal No.11.

See Beehive Tel. Co., Inc., 13 FCC Rcd 12647, 12650-51 (Com. Car. Bur. 1998). Thus, the Commission should have disposed of Beehive's appeal when it issued its order "concluding" this investigation of Beehive's Transmittal No. 11. *See Beehive Tel. Co., Inc.*, FCC 98-320 (Dec. 1, 1998) ("*Rate Prescription III*").

III.

Citing paragraph 2 of the Bureau's designation order, AT&T claims that Beehive is required to submit "detailed cost and demand data that allow the Commission to monitor a carrier's earnings." Opposition at 5. However, the Bureau erred in paragraph 2, when it claimed that section 61.39(b)(1) of the Rules requires cost schedule carriers "to file cost-of-service studies." *Beehive Tel Co., Inc.*, DA 98-2030, at 1-2 (Com. Car. Bur. Oct. 7, 1998) ("*Designation Order*"). Such carriers are required to use cost-of-service studies as a "basis for ratemaking," but they are not required to submit "supporting data" at the time of their access tariff filing. 47 C.F.R. § 61.39(b). They are required only to "be prepared to submit the data promptly upon reasonable request by the Commission or interested parties." *Id.*

Beehive conducted a cost-of-service study, and it submitted its supporting data. However, it did so voluntarily and not at the request of the Commission or AT&T. *See* Letter of Pamela Gaary to Magalie Roman Salas, at 2 (June 16, 1998) (Transmittal No. 11).

The Bureau also erred by contending that section 61.39(b)(5) of the Rules requires cost schedule carriers to file "estimates of how the changes affect the traffic and revenues for the service." *Designation Order*, at 2. That requirement applies only to those local exchange carriers that include "end user common line charges" in their tariffs. 47 C.F.R. § 61.39(b)(5). As we have pointed out

before, Beehive's tariff does not include such charges.[1/]

IV.

AT&T claims that Beehive received "adequate notice" of the issues, and that the Bureau was "very specific about the data Beehive was required to file to justify its rates." Opposition at 5. AT&T then proves Beehive's point by demonstrating its inability to identify the issues or specify the required data. *See id.* at 5-7. The fact is that the Bureau presented Beehive with a moving target -- it specified three matters that it wanted Beehive to explain. *See* Letter of Jane E. Jackson to Russell Lukas at 2 (Oct. 19, 1998). The staff then "fully drafted" an order for the Commissioners that found against Beehive for failing to explain other matters. *Rate Prescription III*, at 11 (separate statement of Comm'r Furchtgott-Roth).

AT&T finds "explicit notice" in the language of paragraph 11 of the *Designation Order* that warned Beehive of the consequences of failing to explain and justify "these expense levels." Opposition at 6. The general reference to "these expense levels" obviously is not explicit. Nevertheless, one need not resort to a maxim of construction (either *ejusdem generis* or *expressio unius*) to read the words "these expense levels" as referring to the expenses allegedly "detailed above" in paragraph 10. *See Designation Order*, at 5. Thus, Beehive had to explain the "substantial amounts" of expenses that the Bureau thought had been moved to the Nevada customer expense accounts, or the alleged movement of the "substantial irregularities and significant amounts of questionable expenses noted in Transmittal No. 8." *Id.* at 4. And that is what Beehive did. *See*

[1/] *See Proposed Revision of 1998 Collection Amounts for Schools and Libraries and Rural Health Care Universal Service Support Mechanisms*, 13 F.C.C.R. 9448, 9460 (Com. Car. Bur. 1998) (separate statement of Comm'r Tristani).

Direct Case, CC Docket No. 98-108, at 19-24 (Oct. 23, 1998).

In drafting the *Designation Order*, the Bureau ignored its obligation to state its directives in plain English. *See McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1353 (D.C. Cir. 1993). If it wanted Beehive to justify its rates by providing an explanation of all the changes in its supporting data, the Bureau should have explicitly directed Beehive to explain "each change in the cost data filed for Transmittal No.[8] that is reflected in the cost information filed with Transmittal No. [11] and to state the specific reason for each change." *Beehive Tel. Co., Inc.*, 13 FCC Rcd 5142, 5148 (Com. Car. Bur. 1998). The Bureau managed to do that with respect to Beehive's Transmittal No. 8. *See id.* The fact that the Bureau limited its demand for explanations in this proceeding to specific changes in "substantial amounts" of expenses led Beehive to reasonably conclude that it should confine its explanations to those particular changes.

V.

It was not "disingenuous" for Beehive to note that the *Designation Order* included no mention of Joy Enterprises, Inc. ("JEI"). *See* Opposition at 6 n.7. Beehive addressed the so-called "JEI expenses" in its Direct Case, because the reclassification of those expenses by its auditor, McNeil Duncan, C.P.A., was the only "substantial" expense that changed from the cost support for Transmittal No. 8. Moreover, Beehive showed how the JEI expenses related to its regulated access services since the Commission had indicated previously that the relationship was not "clear." *Beehive Tel. Co., Inc.*, 13 FCC Rcd 12275, 12283, *reconsider. denied*, 13 FCC Rcd 19396 (1998). However, Beehive was not on notice that the manner of its *use* of the equipment leased from JEI was at issue.

AT&T does not contend the *Designation Order* included the issue of whether the equipment

leased from JEI was used by Beehive as telecommunications plant. Nor does it contend that the Bureau put Beehive on notice that its use of the equipment would be at issue. The question then is whether the issue was "tried" with the implied consent of Beehive. *See Douglas v. Owens*, 50 F.3d 1226, 1236 (3d Cir. 1995). Because "an agency may not base its decision upon an issue the parties tried inadvertently," *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 358 (6th Cir.1992), Beehive can be found to have consented to litigating the issue of whether the JEI equipment was telecommunications plant, only if it knowingly presented evidence "aimed" at that issue. *See id.* That finding cannot be made.

Beehive did not describe how the switching equipment it leased from JEI was utilized, beyond representing that the switching equipment was used at four of its exchanges. *See* Direct Case at 11. Beehive did disclose that the JEI expenses were incurred to stimulate traffic (and the use of its access services), *see* Direct Case at 25-28, and that Mr. Duncan's decision (with which Beehive disagreed) to reclassify the JEI expenses to Account 6610 (Marketing) was based on his view that the expenses were incurred to implement a strategy to stimulate the purchase of Beehive's access services. *See id.* at 22. However, those disclosures were relevant to an issue that was designated for investigation -- whether Beehive had "merely moved" the substantial JEI lease expense from corporate operations and plant specific accounting categories to a customer operations expense account. *See Designation Order*, at 4. Since the matter of the JEI expenses was relevant to a designated issue, the Commission cannot find that a new issue entered the case with the implied consent of Beehive. *See Douglas*, 50 F.3d at 1236; *Yellow Freight*, 954 F.2d at 358. And Beehive's introduction of evidence going to a designated issue does not mean that it was on notice that a new

issue was to be decided. *See Yellow Freight*, 954 F.2d at 358.

VI.

Beehive explained how it calculated its premium and non-premium transport rates and it specified exactly where its calculations appeared in its cost support material. *See* Direct Case at 25. *See also* Rebuttals, CC Docket No. 98-108, at 5 (Nov. 6,1998). Indeed, the Commission acknowledged that Beehive explained how it calculated its rates. *See Rate Prescription III*, at 5. Thus, AT&T is wrong when it claims that Beehive did not carry its burden of proof because it failed to "provide any explanation of how it calculated its proposed rates." Opposition at 8.

VII.

AT&T argues that the Commission "resolved" the three issues set for investigation because it "specifically addresse[d]" each issue. *Id.* In the context of an adjudication, the word "resolve" means "to come to a definite or earnest decision about" or "to deal with (a question, a matter of uncertainty, etc.) conclusively."[2/] The word "address," on the other hand, means "to deal with or discuss."[3/] The Commission may have dealt with or discussed the issues in *Rate Prescription III*, but it did not definitely decide or deal conclusively with them. The "Discussion" section (paragraphs 19-23) of *Rate Prescription III* contains no findings of fact or legal conclusions with respect to: (1) whether Beehive "merely moved" substantial expenses between states and expense accounts; (2) why it reported a 26% increase in interstate net plant; or (3) how it calculated its transport rates.

Beehive does not concede that the Commission even "addressed" all three issues. For example, AT&T showed that Beehive's incorrect use of the weighted DEM allocator accounted for

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2/ THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1639 (2d ed. 1987).

3/ *Id.* at 23.

less than a 3% difference in its reported net plant. *See* AT&T Opposition to Direct Case, CC Docket No. 98-108, at 7 (Oct. 30, 1998). Beehive explained that most of the increase resulted from the completion of its fiber link to Elko, Nevada in which it invested $626,572. *See* Rebuttals at 4, Attach. 2. That caused Beehive's interstate net plant for Nevada to increase from $321,471 in 1996 to $587,866 in 1997.[4/] The Commission did not address Beehive's investment in the Elko project in *Rate Prescription III*, even though that investment was the main reason for the increased net plant that Beehive reported for Nevada in 1997.

VIII.

AT&T obviously knows whether it made a "deal" with the Commission involving access charge refunds. Yet, it does not deny that such a deal was made. *See* Opposition at 9. While Beehive cannot substantiate that the Commission entered into an agreement with AT&T in May 1997, there is documentary evidence suggesting that AT&T agreed that in return for access charge reductions it would not reflect universal service charges as specific line items on any residential customer's bill.[5/] And credible statements have been published that suggest that "secret deals" have been made linking access charge reductions with universal service support. *See, e.g., Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579,* 13 FCC Rcd 11810, 11862 (1998) (Comm'r Furchtgott-Roth, dissenting). In light of such statements and the recent press report on the subject, the Commission should disclose whether any agreements were made with AT&T that involved access charge reductions or refunds.

4/ *See* Transmittal No. 11 Revised Cost Support Material at 188, 390.

5/ *See* Letter of Gerald M. Lowrie to Reed E. Hundt at 1-2 (May 3, 1997) attached hereto.

Beehive did not refer to allegations of a Commission agreement with AT&T to demonstrate agency "bad intent" as AT&T suggests. Opposition at 9. Beehive has the due process right to an impartial, unbiased decisionmaker.[6/] Impartial decisionmaking would be precluded if a Commission deal with AT&T created a strong institutional bias in favor of access charge refunds. And Beehive was obliged to raise the possibility of bias as soon as practicable. *See Pharaon v. Bd. Of Governors of Fed. Reserve Sys.*, 135 F.3d 148, 155 (D.C. Cir. 1998). Beehive had no cause to suspect institutional bias until November 30, 1998, when the press reported the findings of congressional investigators that seemed to link Commission action on 1997 access tariffs with the so-called "line-item controversy."[7/]

IX.

Once again, AT&T dredges up the fact that Mr. Brothers was the subject of a qualifications hearing (at which he appeared *pro se*) twenty years ago. *See* Opposition at 10 n.10. This time AT&T claims that Mr. Brothers' declaration cannot be "credenced." Opposition at 10 n.10. As we have pointed out several times before, Mr. Bothers' pre-1978 conduct is too remote to be relevant.[8/] However, if there is any doubt as to the truth of any material fact averred by Mr. Brothers, the Commission must designate this matter for an evidentiary hearing -- as it did when AT&T stood accused of unlawful conduct. *See Freemon v. AT&T Co.*, 9 FCC Rcd 4032, 4033-34 (1994). The

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6/ See 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.8, at 67 (3d ed.1994); 2 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 6.10, at 298 (2d ed. 1997).

7/ *Hill Report Finds FCC Threats, Political Acts Against AT&T,* COMMUNICATIONS DAILY, Nov. 30, 1998, at 2.

8/ *See, e.g.*, Rebuttals, CC Docket No. 97-249, at 13 (Apr. 24, 1998).

Commission cannot simply brush aside Mr. Brothers' declaration. *See RKO General, Inc. v. FCC*, 670 F.2d 215, 225 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982). If it has grounds to suspect any material representations made by Mr. Brothers under penalty of perjury, the Commission must let an Administrative Law Judge determine whether Mr. Brothers is credible. *See Westel Samoa, Inc.*, 12 FCC Rcd 14057, 14073 (1997), *modified*, 13 FCC Rcd 6342 (1998).

X.

With respect to Beehive's projected 1999 loss of nearly $1.3 million, AT&T questions the "reliability" of the projection claiming that "Beehive has been reluctant to provide . . . the complete information to determine the accuracy of the loss." Opposition at 9 n.9. Beehive has exhibited no such reluctance. In addition to providing its projected 1999 income statement supported by Mr. Brothers' declaration [9/], Beehive has given the Commission audited income statements for the years 1995, 1196 and 1997[10/] and unaudited income statements for the period from just before the effective date (August 6, 1997) of the Commission's first rate prescription to November 30, 1998.[11/] Thus, Beehive has supplied the information necessary to judge the reasonableness of its projection of its 1999 loss.

Beehive has alleged facts which, if true, are sufficient to show that the transport rates the Commission prescribed in this proceeding do not meet the "just and reasonable" standards of *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603-5 (1944). Therefore, the Commission must either make

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9/ *See* Petition for Reconsideration, CC Docket No. 98-108, at Ex. 2 (Dec. 31, 1998).

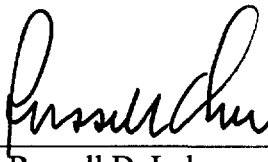
10/ *See* Transmittal No. 11 Cost Support Material, at 466, 486.

11/ *See* Addendum to Direct Case, CC Docket No. 98-109, at Ex. 2 (Oct. 29, 1998); Petition for Reconsideration at Ex. 1.

findings sufficient to resolve Beehive's *Hope* challenge, or give Beehive a hearing to determine whether the rates prescribed in *Rate Prescription III* are confiscatory under the *Hope* standards. *See Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168, 1177-82 (D.C. Cir. 1987) (*en banc*).

Respectfully submitted,

BEEHIVE TELEPHONE COMPANY, INC.
BEEHIVE TELEPHONE, INC. NEVADA

By 
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May 3, 1997

The Honorable Reed E. Hundt
FCC
1919 M Street, NW
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Washington, D.C. 20554

Dear Chairman Hundt:

This letter is intended to further articulate AT&T's commitment to flow through access reductions. AT&T will flow through all access savings it receives as a result of the actions that the Commission takes in its Access Reform Rulemaking and related proceedings[1] proportionately to consumer and business services. In the event that net switched access reductions to the interexchange industry equal at least $1.7 billion effective July 1, 1997, AT&T also will make the following commitments:

1. AT&T's access flow through will include reductions to AT&T's consumer basic schedule prices of 5 percent to the day schedule, 5 percent to the evening schedule and 15 percent to the night/weekend schedule effective with the date of such access reductions.

2. AT&T will flow through any further access savings resulting from these access reform related proceedings to its basic schedule consumer prices in the proportion attributable to its basic consumer call volumes effective with the date of such access reductions.

3. Under the current universal service system AT&T and other interexchange carriers today make a universal service contribution that is calculated as a monthly flat charge per presubscribed access line. This charge today ranges between 50 and 60 cents per line, per month. AT&T and other interexchange carriers do not reflect this charge as a specific line item on any residential customer's bill. Rather, this universal service contribution is recovered through other charges for interstate service, including the per-minute charges for interstate long distance calls. The Commission reportedly is considering

[1] Access charge related decisions adopted during May 1997.

reforms to the existing universal service programs that would modify the above-described practices. The Commission also reportedly is considering reforms to the interstate access charge rules that may include the assessment of flat charges per line, per month, to interexchange carriers. As long as such flat charges are not in excess of the above-referenced current flat charges, AT&T commits that it will not reflect any such flat charges as specific line items or other flat charges on any interstate basic schedule residential customer's bill at least until July 1, 1998. For the six month period thereafter, AT&T makes the same commitment, provided, however, that it has not incurred prior to July 1, 1998, a significant and material loss of revenue from its basic schedule residential customers to dial around services. In the event that AT&T has reason to believe that such a loss has occurred, AT&T shall inform the Commission in writing not later than May 1, 1998. If such loss occurs after May 1, 1998 AT&T shall inform the Commission in writing sixty days prior to taking such action.

Sincerely,

Copy to: The Honorable James H Quello
The Honorable Susan Ness
The Honorable Rachelle B. Chong
Ms. Regina M. Keeney

CERTIFICATE OF SERVICE

I, Paula L. Rogers, a secretary in the law offices of Lukas, Nace, Gutierrez & Sachs, Chartered, do hereby certify that I have on this 20th day of January, 1999, had a copy of the foregoing REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION hand-delivered to the following:

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